



FEDERAL ELECTION COMMISSION

WASHINGTON D C 20463

AUG 16 2004

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Winterhawk Enterprises, LLC  
c/o National Registered Agents, Inc  
879 W. Baxter Drive  
South Jordan, UT 84095

RE MUR 5333

Dear Sir or Madam:

On June 30, 2004, the Federal Election Commission found that there is reason to believe Winterhawk Enterprises, LLC violated 2 U S C §§ 441b(a), 441a(a)(1)(A) and 441f, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

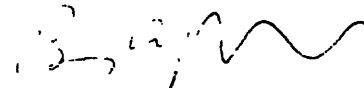
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If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith  
Chairman

Enclosures

Factual and Legal Analysis

Procedures

Designation of Counsel Form

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Winterhawk Enterprises, LLC

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**I. GENERATION OF MATTER**

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. § 437g(a)(2)

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Available factual information**

The available information indicates that political contributions were made by checks drawn on the account of Winterhawk Enterprises ("Winterhawk") to John Swallow for Congress ("Committee"). The contributions were attributed to several contributors, as set forth in the chart below. Winterhawk is a limited liability company ("LLC") identified in public records as an active LLC organized in Utah.<sup>1</sup>

Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterhawk Enterprises	3/29/02	\$4,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay <sup>2</sup>
Winterhawk Enterprises	6/21/02	\$5,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay, Haley Gay <sup>3</sup>

<sup>1</sup> Winterhawk is listed in public records as Winterhawk Enterprises, LLC

<sup>2</sup> The Committee disclosed the receipt of \$1,000 from each Gay on March 31, 2002, designated for the Republican party convention

<sup>3</sup> The Committee disclosed the receipt of \$1,000 from each Gay on June 28, 2002, designated for the general election

1 In the first instance, Winterhawk wrote a \$4,000 check to the Committee dated March 29,  
2 2002. The signature on the check appears to be that of Dennis Gay and the memo line reads  
3 "Dennis, Gina, Bodee, Kim Campaign Donation " The Committee sent a letter to Winterhawk,  
4 dated March 31, 2002, expressing thanks for the contribution and then stating.

5 The strict Federal Election Commission regulations [prohibit] making contributions on  
6 behalf of someone else to federal election campaigns We must refund this money to you  
7 within thirty (30) days unless you can establish in writing that the contribution came from  
8 personal funds of a corporate drawing account, such as a draw against salary, wages,  
9 dividends, etc. Please confirm that such was indeed the case with this check by signing  
10 below...

11  
12 The letter provides fields for the signature, occupation, employer and date of each Gay. The  
13 completed fields contain the signatures of all four individuals dated April 10, 2002, and identify  
14 "Majestic ent,"<sup>4</sup> as the employer of all four individuals <sup>5</sup>

15 The available information also indicates that Winterhawk wrote a \$5,000 check to the  
16 Committee on June 21, 2002. The signature on the check appears to be that of Dennis Gay and  
17 the memo line reads "Dennis, Gina, Bodee, Kim, Haley Campaign Dona" [sic] The Committee  
18 sent a copy of an undated letter to Winterhawk regarding the contribution, identical to its  
19 March 31, 2002 letter to Winterhawk The Committee's undated letter makes no mention of  
20 Haley Gay, the fifth attributed contributor. The completed fields contain the signatures of the  
21 four Gay contributors, with dates ranging from September 20 to September 25, 2002, and  
22 identify "Majestic" as the employer of three individuals.<sup>6</sup>

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<sup>4</sup> Utah state records indicate three business entities whose names start with "Majestic ent," all of which are expired Nevada state records list "Majestic Media Holdings, Inc ," with Gina Gay as president and Dennis Gay as secretary and treasurer

<sup>5</sup> The Committee's disclosure report identified Winterhawk as the employer of all four individuals

<sup>6</sup> The employer field is blank for the fourth individual, Dennis Gay The Committee disclosed Winterhawk as the employer of all four individuals

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**B. Law on contributions by LLCs, corporations and partnerships**

The Commission's regulations establish two possible treatments for contributions by business entities that are recognized as limited liability companies under the laws of the State in which they are established. 11 C.F.R. § 110.1(g)(1). The treatment depends on how the firm elects to file with the Internal Revenue Service ("IRS"). *Id.* at 110.1(g)(2). If the contribution is from an LLC filing with the IRS as a partnership pursuant to 26 C.F.R. § 301.7701-3, or from one that fails to make an election, it shall be treated as a contribution from a partnership pursuant to 11 C.F.R. § 110.1(e). *Id.* If the contribution is from an LLC electing to file with the IRS as a corporation, the contribution is prohibited 2 U.S.C. § 441b(a) and 11 C.F.R. § 110.1(g)(3). An LLC that makes a contribution pursuant to this provision shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that it is eligible to make the contribution. 11 C.F.R. § 110.1(g)(5).

The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits corporations from making contributions in connection with any election and prohibits any candidate or political committee from knowingly accepting or receiving any such contributions. 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any corporation from consenting to any contribution by the corporation. The Commission has recognized, however, limited circumstances in which a corporate employee may make a contribution drawn on a corporate account, specifically, a nonrepayable corporate drawing account established to permit an employee to draw against her salary, profits or other compensation. *See Campaign Guide for Congressional Candidates and Committees* (2002),

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1 page 21; *FEC Record*, September 1978, page 1<sup>7</sup> Contributions may not be made from the  
2 general treasury fund of corporations. See 2 U.S.C. § 441b(a), *cf. FEC v. Massachusetts Citizens*  
3 *for Life*, 479 U.S. 238, 241 (1986)

4 A contribution by a partnership shall be attributed to the partnership and to each partner  
5 in one of two ways: 1) in proportion to his or her share of the profits, according to instructions  
6 which shall be provided by the partnership to the political committee or candidate; or 2) by  
7 agreement of the partners, as long as only the profits of the partners to whom the contribution is  
8 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses  
9 increased) in proportion to the contribution attributed to each of them. 11 C.F.R. § 110.1(e) A  
10 contribution by a partnership shall not exceed the Act's limitations on contributions, and no  
11 portion of such contribution may be made from the profits of a corporation that is a partner. *Id.*

12 **C. Analysis of contributions**

13 Winterhawk, an LLC, wrote \$9,000 in contribution checks to the Committee.  
14 Winterhawk attributed this amount to Bodee Gay, Dennis Gay, Gina Gay, Kim Gay and Haley  
15 Gay. No contributions were attributed to the LLC itself. The threshold question regarding LLC  
16 contributions is whether the LLC is to be treated as a corporation or as a partnership, which  
17 depends on whether the LLC elected federal income tax treatment as a corporation. See  
18 11 C.F.R. § 110.1(g). The available information does not indicate whether Winterhawk elected  
19 tax treatment as a corporation

<sup>7</sup> The only place in the Act or the Commission's regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. See 11 C.F.R. § 102.6(c)(3). This regulation provides that a contributor may write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor's personal checking account or on a "non-repayable corporate drawing account of the individual contributor." *Id.* See also Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983).

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1           The Winterhawk checks on their face attribute the contributions among several  
2 individuals, but it does not appear that the LLC affirmed to the Committee that it is eligible as an  
3 entity to make the contributions in the first place. See 11 C.F.R. § 110.1(g)(5). Instead, the  
4 Committee's letters in response to the LLC contribution checks invite the attributed individual  
5 contributors to categorize the contributions as coming from "personal funds of a corporate  
6 drawing account, such as a draw against salary, wages, dividends, etc." Each individual  
7 contributor appeared to agree with this categorization by signing in the space provided. While  
8 the Commission permits contributions from corporate employees drawn on nonrepayable  
9 corporate drawing accounts, *see supra*, the contributions here do not appear to be drawn on such  
10 accounts. First, the checks appear to be drawn on the general treasury account of an LLC; no  
11 account name is indicated on the checks relating to a possible nonrepayable drawing account.  
12 Second, the attributed individual contributors may not even be employees of the LLC. None of  
13 the attributed contributors listed Winterhawk as their employer, but the Committee disclosed  
14 Winterhawk as the employer of all four individuals.

15           Thus, if Winterhawk has elected federal income tax treatment as a corporation, its  
16 contribution checks may constitute impermissible corporate contributions. Therefore, there is  
17 reason to believe that Winterhawk Enterprises, LLC violated 2 U.S.C. § 441b(a).

18           If, in the alternative, Winterhawk is treated as a partnership, its checks to the Committee  
19 constitute contributions from the LLC itself as well as from the "partners" of the LLC. See  
20 11 C.F.R. § 110.1(e).<sup>8</sup> Thus, Winterhawk, in writing checks to the Committee in the amounts of  
21 \$4,000 and \$5,000, contributed \$9,000 to the Committee in connection with the convention and

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<sup>8</sup> Persons with an ownership interest in an LLC are called "members" rather than "partners." See Utah Revised Limited Liability Company Act, Utah Code Ann. § 48-2c-102(14).

1 general elections, well in excess of the statutory limit. Therefore, there is reason to believe that  
2 Winterhawk Enterprises, LLC violated 2 U.S.C. § 441a(a)(1)(A).

3 Finally, if Winterhawk was treated as a corporation, then it made contributions in the  
4 names of the various individuals to whom the contributions were attributed. The Act prohibits  
5 contributions made in the name of another person. *See* 2 U.S.C. § 441f. Therefore, there is  
6 reason to believe that Winterhawk Enterprises, LLC violated 2 U.S.C. § 441f.

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